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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 496

JAMES MATTHEWS, JOHN HENRY NICHOLS, AND JOHN HENRY RADNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 113-114) is reported at 177 F. 2d 278.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1949 (R. 115), and a petition for a rehearing (R. 116-120) was denied November 25, 1949 (R. 121). The petition for a writ of certiorari was filed December 23, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to order a bill of particulars setting forth the specific acts of petitioners constituting "working in a distillery."

2. Whether the trial court erred in permitting a government agent-witness to remain in court throughout the trial after petitioners invoked the rule as to sequestration of the witnesses.

3. Whether the trial court erred in permitting the prosecution to show on cross-examination of petitioner Matthews that he had been convicted ten years previously of a similar offense.

4. Whether the evidence is sufficient to support petitioners' convictions.

STATUTES INVOLVED

26 U. S. C. 2810:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *.
>
> * * * * *
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

26 U. S. C. 2831:

Every person engaged in distilling * * * spirits * * * shall place and keep conspicuously on the outside of the place of such business a sign * * * with the words: "Registered distillery" * * *.

* * * And every person who works in any distillery * * * on which no sign is placed and kept, as hereinbefore provided, * * * shall be fined not less than $100 nor more than $1,000, or be imprisoned not less than one month nor more than six months.

26 U. S. C. 2833:

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

STATEMENT

Petitioners Matthews, Nichols, and Radney, together with one Stewart, were convicted (R. 78) on an indictment in four counts charging possession of an unregistered still (count 1, 26 U. S. C. 2810), carrying on the business of distillers without having given bond (count 2) and with intent to defraud the United States of taxes (count 3, 26 U. S. C. 2833), and working in an unregistered distillery (count 4, 26 U. S. C. 2831) (R. 2-3). The

Court of Appeals affirmed petitioners' convictions, but reversed Stewart's because it found the evidence against him insufficient (R. 113-114).

The evidence for the prosecution showed that on the evening of August 27, 1948, Cone, an investigator for the Alcohol Tax Unit, and three Georgia revenue agents—Brooks, Smith, and Robinson—observed a moonshine distillery with two 220-gallon stills fired by an oil burner, in Butts County, Georgia. Nobody was around at the time, but the still was set up for operation and the agents saw about 3,000 gallons of beer mash in barrels ready for distillation. (R. 15-17.) They remained near the still all night and at about 4:25 the next morning, August 28, they saw two men drive an old truck across a plowed field to within 30 or 40 steps of the wooded area where the still was located (R. 18). On the truck, which bore no license plates (R. 31), there were 90 cases of gallon jugs and four 50-gallon oil drums (R. 21). A few minutes after the two men walked to the still, the oil burner was lit (R. 18), but because of the darkness the officers could not see who started the burner (R. 23, 36). While Robinson was examining the truck the two men, petitioners Nichols and Radney, returned to it. Robinson arrested Nichols. Radney tried to get away but Brooks caught and arrested him. (R. 18-19, 34.) After Smith took Nichols and Radney to the still (R. 19), the other officers saw petitioner Matthews and Stewart, the latter

carrying a box of groceries, walking across the cultivated field in the direction of the still (R. 19, 25, 26, 63). The officers hid in some bushes and heard Matthews remark, as he approached the truck, "Well, I see this old piece of truck finally did get here all right" (R. 20, 26, 28, 35). Matthews then walked to the still. After stirring his hand in one of the barrels of mash and taking a sip of it, he said, "It's dead ready," and asked, "How many more are ready to go" (R. 20, 28, 40). When Matthews saw officer Smith leaning against one of the barrels and inquired as to who he was, Smith asked Matthews the same question. Cone then came out of hiding and told Smith that the man was Matthews. Recognizing Cone as an officer, Matthews said, "Well, I guess we're caught all right" (R. 20, 29), and added, "couldn't a darn one of you fellows get away" (R. 20, 36). Meanwhile, Robinson arrested Stewart, who was behind Matthews as he approached the still (R. 35). Several days later, Matthews made bond for Nichols, Radney, Stewart, and himself (R. 21-22).

Matthews' version was that a Negro, whose name and address he did not know, had told him about the still (R. 52); that four days later, after parking his truck on the highway, he walked about a quarter of a mile across a cultivated field in the early morning darkness and found the still without any trouble (R. 55, 60); that he was going to the still to buy some keg whiskey, as he told the

officers, but did not know whose still it was and did not have enough money to buy the liquor that morning (R. 47, 59); and that he was not afraid of being shot at near a strange still early in the morning (R. 56, 60). In contradicting prosecution evidence, Matthews denied that Stewart had gone with him to the still (R. 45, 46, 55); denied that he ran his hand through the beer and that anyone said, "It's dead ready" (R. 46, 47-48); and stated that he said in regard to the truck, "I wonder what they got this old junk in here for" (R. 44-45). In rebuttal, Cone testified that Matthews did not tell the officers he came to the still to buy liquor (R. 62), and that Stewart had said that Matthews picked him up in his truck and took him to the still on the day of the raid (R. 65).

ARGUMENT

1. There is no merit in petitioners' contention (Pet. 22-23) that the trial court abused its discretion in denying their motion for a bill of particulars (R. 4-5), which was not filed until the day of the trial (R. 4, 6), in so far as they sought particulars as to the acts of each defendant which the prosecution contended constituted working in the distillery. In apologizing for the delay, their counsel stated: "Your Honor please, we apologize for not making this motion for a bill of particulars at an earlier date, but some time it is just hard to get around to doing what needs to be done prior to

the trial" (R. 7).[1] Obligingly, the government attorney orally supplied the information requested as to the time and place of the offenses alleged in the indictment, but as to the particular acts which constituted "working in a distillery," under count 4, the trial court ruled, "that would be a matter of evidence" (R. 9-10).

The application for a bill of particulars was addressed to the sound discretion of the court. Clearly, there was no abuse of discretion in denying the request for particulars as to what "each one of these four defendants did" (R. 10). For as the prosecutor pointed out in opposing this request, it called for evidence of the acts of each defendant (*ibid.*). And, of course, as the trial judge ruled, that is not the function of a bill of particulars. It is equally clear that there was no prejudice to petitioners in defending against the charges, especially in view of the particulars voluntarily supplied by the prosecutor. The argument here to the contrary is frivolous. At the time the court denied the request as calling for evidence, petitioners' counsel replied, "All right, sir, we just did not want to waive that ground of our motion" (R. 10).

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[1] Petitioners had not previously been arraigned on the indictment. Technically, their motion for a bill of particulars was therefore not untimely under Rule 7(f), F.R. Crim. P., which provides that such a motion "may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order."

2. Also clearly without substance is petitioners' complaint (Pet. 23-24), with no supporting authorities cited, that the trial court erred in permitting the government witness Cone to remain in court throughout the trial after petitioners' counsel had invoked the rule as to sequestration of the witnesses (R. 13-14). Sequestration of the witnesses is discretionary with the trial court, and its ruling will not be disturbed in the absence of manifest prejudice.[2] There was no prejudice to petitioner by reason of Cone's remaining in court during the trial, because he could have been used as a rebuttal witness to supply the same evidence even if he had been excluded from hearing the other testimony. It is doubtful whether it would have been proper to charge the jury, as petitioners now suggest should have been done (Pet. 24), although there was no such request at the trial, that they might consider Cone's presence throughout the trial as bearing upon his credibility. Cone's mere presence would have no logical tendency to render his testimony unreliable.

3. Petitioners also urge that the trial court erred in permitting the prosecution to show, in cross-examining petitioner Matthews, that he had been convicted in the same court ten years previously on a liquor charge (R. 51) because the conviction

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[2] *Kaufman* v. *United States*, 163 F. 2d 404, 408 (C.A. 6), certiorari denied, 333 U.S. 857; *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702.

was too remote to have any bearing on his credibility (Pet. 24-25). The prior conviction was not introduced to put Matthews' character in issue, as defense counsel contended (R. 50), but for the sole purpose of impeachment, the trial court explicitly instructing the jury to that effect (R. 51). Whether the conviction was so remote as to have no probative value was a question addressed to the sound discretion of the trial court. Since the prior conviction was for a similar offense and, as the court pointed out, its weight as affecting Matthews' credibility was for the jury to determine (R. 50), there was no abuse of discretion in admitting the evidence for the limited purpose for which it was offered.[3]

In this connection, petitioners also argue (Pet. 25-33) that the trial court erred in permitting the prosecutor to question Matthews, before bringing out the fact of the prior conviction, as to whether he remembered the prosecutor and other persons who figured in that case in 1938. Defense counsel objected that this was not the proper way to introduce the conviction for impeachment purposes. But the prosecutor pointed out that he was also testing Matthews' memory, since he had testified that he did not remember seeing anybody around the still at the time of the arrests or that the mash

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[3] See *Claunch* v. *United States*, 155 F. 2d 261, 263 (C.A. 5) (1933 conviction admissible in a case decided by the Court of Appeals in 1946); *Goddard* v. *United States*, 131 F. 2d 220 (C.A. 5) (12-year old conviction admissible).

was "hot and ready to go." This was proper cross-examination, for, as the court said in overruling the objection, the prosecutor had "a right to test his memory." (R. 49.) Neither is there any merit in petitioners' further contention that Matthews' negative and equivocal answers to the prosecutor's preliminary questions constituted a denial of the prior conviction and thus foreclosed further questioning concerning it. Obviously, Matthews did not deny in his answers to these questions that he had been convicted in 1938. He only denied that he remembered the prosecutor. When he was asked a moment later whether he had been convicted in the same court in 1938 of conspiracy to violate the federal liquor revenue laws, he readily admitted that fact.

4. Finally, petitioners assert that the evidence is insufficient to support the jury's verdict (Pet. 33-41). But both courts below upheld the sufficiency of the evidence as to petitioners, the Court of Appeals remarking that "There is abundant evidence in the record which points unerringly to the guilt of each" of them (R. 114). Our summary of the evidence in the Statement, *supra,* pp. 4-6, amply supports this conclusion. In view of the holdings below, we submit that there is no occasion for further review of this question by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

CONCLUSION

There is no conflict of decisions, and no questions are presented meriting further consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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